NO. 87-1344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AHMED SROUR,

Petitioner,

—v.—

THE UNITED ARAB EMIRATES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT

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EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

AHMED SROUR,

Petitioner,

-against-

UNITED ARAB EMIRATES,

Respondent.

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Is this action barred by Foreign Sovereign Immunity Act, not being a commercial activity? The courts below answered this in the affirmative.

2. Is this action barred by Diplomatic Immunity in that U. A. E. Mission to U. N. and its Ambassador are indispensable parties, and should the action be dismissed in absence of U. A. E. Mission and its Ambassador as parties?

3. Should the cause of action for punitive damages against a foreign sovereign state be dismissed?

4. Should the action be dismissed for defective service and failure to serve Notice of Appeal?

STATEMENT

No Notice of Appeal was ever served on attorney for Respondent or the Government of United Arab Emirates. The service of Notice of Appeal is essential in any action, and is statutorily necessary under Foreign Sovereign Act.

Since the Government of the United Arab Emirates was not provided with Notice of Appeal in accordance with Federal Rules of Appellate Procedure and Foreign Sovereign Immunity Act which provides special procedure for service of papers, there was no appeal pending before the Second Circuit, and the Appeal should be dimissed on that ground. United Arab Emirates V. 40 D6252, 447 F. Supp. 710 (Weinfeld, D. J.), 28 U. S. C. A. 1608.

Although Petitioner had obtained the consent of attorney for Respondent to include in the Record Respondent's response to the Motion, the Reply of Respondent and State Department intervention, they included only their affirmation which was not docketed.

Respondent never consented to delete the Arabic text which will show no signature and no contract and that it does not conform to the English text and it is not authenticated. While the English text claims that certain documents are signed, the Arabic text is not attached to show if in fact they are signed. The Arabic text attached to the Complaint shows that alleged documents are not signed.

The Second Circuit granted leave to file supplementary appendix. Yet, Petitioner again omitted important documents which were part of Record below.

The Petitioner was appointed by United Arab Emirates Mission to the United Nations as an official on March 1, 1981 at a salary of $1,200.00 monthly. This employment was terminated on December 31, 1983 and he was appointed as a researcher and political advisor on January 1, 1984 at a salary of $24,000.00 annually. He was assigned various functions at committees in the United Nations representing United Arab Emirates. The Reply Affirmation intentionally ommited by attorney for Petitioner contains the various assignments of Mr. Srour and his listing as a delegate by United Nations.

The Ambassador to the United Nations assigned him to an Economic Committee. Petitioner refused. He absented himself without cause or permission and was discharged for cause on July 11, 1985 in accordance with United Arab Emirates Rules and under which he was employed.

Since he was an employee of United Arab Emirates Mission to the United Nations and clearly admitted in the Complaint, the United Arab

Emirates Mission to the United Nations is an indispensable party. However, because of diplomatic immunity, Petitioner devised a method to circumvent the Diplomatic Immunity Act by attempting to sue United Arab Emirates, a foreign sovereign state. The function of the Mission to United Nations or Embassy ot the United States of America is not a commercial activity. Thus this action was properly dismissed under Foreign Sovereign Immunity Act, by the United States District Judge, and unanimously affirmed by United States Court of Appeals, Second Circuit.

The Complaint admits:

1. Srour was employed by U. A. E. Mission to U. N.
2. He refused an assignment by the Ambassador of U. A. E.
3. He was discharged by U. A. E. Ambassador to U. N.
4. He carried functions for U. A. E. Mission at various committees of U. N.
5. Diversity is not raised and the case rests exclusively on Foreign Soverign Immunity Act.
6. Srour is claiming certain rights under U. A. E. Laws which are only applicable in U. A. E.

7. The Complaint on its face shows lack of jurisdiction of this Court.
8. The Complaint does not show a cause of action in contract or tort.

Judge Knapp dismissed the Complaint on lack of commercial activity exception, and did not pass on the many other grounds raised. The U. S. Court of Appeals, Second Circuit affirmed.

PROCEDURE BELOW

Respondent moved to dismiss the Complaint under Foreign Soverign Immunity Act. The Docket sheet contains under #9 filing Notice of Appeal on August 4, 1986, but there is not affidavit of service on Respondent or their attorney. No Notice of Appeal was served on attorney for Respondent. On August 8, 1986 there is a notation that Notice of Appeal was forwarded to District Judge.

The Appeal is from "Memorandum and Order" and was entered on August 1, 1986.

A Judgment was entered on August 1, 1986. This Judgment was not served on Respondent or his attorney, and no Appeal was taken from the Judgment. The Judgment refers to date of Order as

July 30, 1986. The Judgment is dated July 31, 1986 and entered August 1, 1986.

POINT I

THE APPEAL SHOULD BE DISMISSED FOR FAILURE TO SERVE NOTICE OF APPEAL FROM MEMORANDUM AND ORDER TO TAKE AN APPEAL FROM JUDGMENT THAT WAS ENTERED

Rule 25 (b) of Federal Rules of Appellate Procedure states:

> (b) Service of All Papers Required - copies of all papers filed by any party and not required by these rules to be served by the Clerk, at or before the time of filing, be served by a party or person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

No service was made of Notice of Appeal on counsel.

Article (d) reads:

> Proof of Service - papers presented for filing shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and the name of persons served, certified by the person who made service. Proof of service may be filed without

acknowledgement or proof of service but shall require such to be filed promptly thereafter.

No proof of service was filed. Attorney for Petitioner was under the impression that she had to file Notice of Appeal with clerk of District Court, pursuant to Rule 4 of the Federal Rules of Appellate Procedure, but not to serve it on counsel for Respondent.

The Notice of Appeal was taken after the entry of the Judgment, but was not taken from the Judgment. Thus, Rule 4 (2) does not apply and the appeal from a decision - order cannot be treated as filed after entry of Judgment.

The Notice of Appeal on the Docket sheet was filed on August 4, 1986. The Judgment was entered on Docket sheet on July 31, 1986.

On August 8, 1986, there is an entry in Docket sheet that the Notice of Appeal and Docket entries were forwarded to Distirct Judge. There is no entry for proof of service of Appeal from Order.

The service of Notice of Appeal, although essential in all cases, is required in cases arising under Foreign Sovereign Immunity Act. Although the Act provides for special method of

service on foreign states, it is silent as to service of Notice of Appeal.

The Act's intention was to give adequate service to the foreign state, Notice of Suit, translation in its language, and other safeguards. Both Respondent and U. S. Department of State had raised the issue that original service of Summons and Complaint was defective.

POINT II

THE SERVICE OF SUMMONS AND COMPLAINT IS DEFECTIVE

Foreign Sovereign Immunity Act (FSIA), 28 U. S. C. 1608 provides for method of service on foreign states.

There is no affidavit of service alluding that service cannot be made in accordance with applicable international convention on service of judicial papers, 20 UST 361, TFAS 6638 (1969). The Docket sheet refers to "served: not legible".

Date of service is not known. No reference is made to Notice of Suit or any Arabic translation.

There is no proof of service or compliance with FSIA.

There is no mention of service of notice of document listed including FSIA. While the Notice of Suit refers to a docket number, there is no number A-17, A-4. The Complaint and Notice of Suit are not signed by attorney for Petitioner, A-11, A-18.

The Petitioner erroneously considered U. A. E. Mission to U. N. as agent of U. A. E. with regard to this action. In Gray V. Permanent Mission of Congo to U. N., 443 F. Supp. 816 (S. D. N. Y. 1978), aff. 580 F 2nd 1044 (2nd Cir.), it was held that a permanent mission to U. N. was a "foreign state" and not merely an agency or instrumentality of a foreign state and service under 28 U. S. C. 1608 (1) and (2) was not complied with.

POINT II

THE EMPLOYMENT OF A MEMBER OF A MISSION TO U. N. IS NOT COMMERCIAL ACTIVITY

It is clear from legislative history and court decisions that the conduct of foreign affairs, the maitenance of a diplomatic mission, is not within the commercial activity exception, but the essence of government political activity.

The use of Libyan Mission to U. N. was held to be governmental activity and not commercial activity. City of Edgewood V. Libya (3rd Cir., 1985) 773 F. 2nd 80.

See Carvey V. National Oil Corp. (2nd Cir., 1979). 295 F. 2nd 673, where act of state doctrines was applied and Libya was held to be immuned. In Friedar V. Israel, 614 F. Supp. 395, act of state doctrine was applied. In Arango V/ Guzman Traver Advisors Corp. (5th Cir.) 1980, 621 F. 2nd 1371, the court held that airline employees are agents of Government of Dominican Republic in their performance of their official governmental duties, and tort action was dismissed.

The U. S. Court in its Memorandum, quoted from this case, states: "The focus of the exception to immunity recognizec in 1605 (a) (2) ... on whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity." The activity of the Sovereign here is not hiring or firing, it is not an employment agency, but the activity is the conduct of foreign affairs, and the political activity of representation at United Nations as a member state.

In Castro V. Saudi Arabia, (D. C. Texas, 1980), 510 F. Supp. 309, it was held that employment contract for training of personnel is governmental and not commercial and Saudi Arabia was immuned.

In De Sanchez V. Banco Central de Nicaragua (5th Cir., 1985) 770 F. 2nd 1385, the U. S. Court of Appeals held, where a government eneters a contract, in ascertaining commercial activity exception [28 U. S. C. A. # 1605 (a) (2)], two questions are involved: first, the relevant activity must be defined with precision, which requires focusing on acts of named defendants; second, it may be determined if the relevant activity is sovereign or commercial, a label which depends on nature of activity. Thus issuance of checks was sovereign.

In Gibbons V. Ireland (D. C. 1982) 532 F. Supp. 648, the Court held that immunity of foreign states is the rule not an exception and courts must respect the immunity of foreign sovereigns unless some exception to the rule of Sovereign Immunity is clearly warranted.

West Indies Central Labor Organization, was an arm of a sovereign state, and participation in terms and conditions of workers was not commercial

activity and was held immuned. Rios V. Marshall, (S. D. N. Y. 1981) 530 F. Supp. 351, Judge Gagliasdi.

In Pratical Concepts V. Bolivia, 613 F. Supp. 863 (D. C. 1985), Judge Parker, the Court held that Congress left the definition of commercial activity to courts, and concluded that the contract includes numerous terms that only a sovereign state could perform (p. 869).

In another action where a wife sued for distress (as in this action), the action was dismissed on immunity. Frolova V. Soviet Union (7th Cir. 1985) 761 F. 2nd 370.

The Court described governmental activity as acts or decisions made at policy making or planning level of government, and stated that those acts or omissions of fundamental governmental nature are not actionable. Olsen V. Mexico (9th Cir. 1984) 729 F. 2nd 641 Cert. den. 105 S. Ct. 295.

In Skern V. Brazil (D. C. 1983), 566 F. Supp. 1414, the Court held that it has no jurisdiction to redress wrong suffered at hands of foreign diplomats.

The Complaint refers to action of U. A. E. Ambassador in transferring Petitioner and in discharging him for failure to obey his orders and refusal to perform services and absenting himself without permission.

Judge Cannella, in Texas Trading Corp. V. Central Bank of Nigeria (S. D. N. Y., 1980) 500 F. Supp. 500, dismissed a complaint for lack of subject matter jurisdiction and personal jurisdiction, FRCP 12 (b) (1) (2); 647 F. 2nd 300 (2nd Cir. 1981).

Judge Kevin Duffy dismissed a similar complaint, Gibralter Petroleum Corp. V. Bank Sepah, 526 F. Supp. 561, a claim between foreign national and a foreign state. Canadian Overseas Ores Ltd. V. Campania De Acero Del Pacifico, 528 F. Supp. 1337, (1984 - Judge Lasker), affirmed, 727 F. 2nd 274 in a claim for injury, [28 U. S. C. 1605 (a) (2)], the complaint was dismissed, and held that a foreign national cannot sue a foreign state for breach of contract not governed by Federal Law. Gemeni Shipping Inc. V. Foreign Trade Organization and Syrian General Organization (Judge Pollack, 1980), 496 F. Supp.

Even a contract by Bangladesh to purchase and export monkeys was held to be governmental as it

is in regulation of wild life, and activity of a sovereign. Mol. V. Bangladesh (Or. 1983) 572 F. Supp. 79. Aff. 736 F. 2nd 1362, Cert. denied 105 S. Ct. 513.

If purchasing monkeys is not considered commercial activity, why should the employment of a diplomat be considered commercial activity? If the U. A. E. had employed a monkey, it would not be considered commercial!

See International Association of Machinests V. OPEC (D. C. Cal. 1979), 477 F. Supp. 553. The action was dismissed under FSIA. We are unaware of a private party, being a member of U. N. membership is only open to sovereign states under U. N. Charter. The conduct of foreign affairs and representation to United Nations is not open to private persons. The Court held that the activities of OPEC members are not commercial activities and held that defendants are entitled to immunity under 28 U. S. C. 1604 and the Court lacks jurisdiction, 28 U. S. C. 1330 (a). The Court stated on page 567 that to determine if activity is commercial or governmental, it should examine standards recognized under International Law. International Law recognizes states only as members of United Nations.

It must be realized that the FSIA is grounded in the history of State Department's attempts to regularize our Court's treatment of foreign state agencies. The basic distinction is between "governmental" and "commercial activity. The immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (Jure Imperii) and does not extend to suits based on its commercial or private acts (Jure Gestionis) H. R. Rep. No. 94, 1487, 94th Congress 2nd Sess. 13, reprinted in (1976) U. S. Code Cong. and Admin. News, Page 6604-5.

As to the statement as to third country nationals, this can hardly apply to Arab states, where the State Department can list a number of Ambassadors who are nationals of another Arab state. Many members of Arab Missions to U. N. are nationals of other Arab states. These nationals, such as Petitioner, are listed in U. S. documents and are recognized as representatives. The list of U. A. E. Mission to U. N. was submitted and approved by U. S. Government. It contains the name of Petitioner. Furthermore, the exact status, nationality or permanent residence status of Petitioner is not submitted or proved. In absence of proof, he is stateless.

Since diversity is not raised, he is referred to as a resident of New York, a misleading statement. There must be a distinction between any employment in U. S. A. and employment in a mission to U. N. Embassy or Consulate which are entitled to Diplomatic Immunity. Petitioner claims to be a civil servant governed by Ruels of U. A. E. He attended U. N. meetings and spoke as representative of U. A. E.

POINT IV

THE COURT LACKS JURISDICTION OVER SUBJECT MATTER

The Complaint refers to United Arab Emirates (U. A. E.) as a foreign sovereign state, which maintains an office and a mission at 747 Third Avenue, New York, New York 10017. Thus the action is definitely against the U. A. E. Mission to U. N. on Petitioner's theory that a mission to U. N. is the agent of the state.

The Complaint defines Petitioner as resident of the State of New York and U. S. A. Obviously an attempt is made to mislead the Court in the use of this term to indicate a citizen of New York. It states the jurisdiction is invoked under 28 U. S. C. 1330. There must be specific reference to 28 U. S. C. 1330 (a) to invoke jurisdiction, as 28

U. S. C. 1330 invokes jurisdiction including diversity. Failure to specifically refer to the section of the statute under which jurisdiction is invoked is fatal and the Complaint should be dismissed on this ground.

Even the substance law is defective as the alleged contract is oral and alleged tort is "distress", both not maintainable in New York.

The following are comments on Ver Linden B. V. V. Central Bank of Nigeria:

The case involved commercial activity. A contract with Nigeria for purchase of cement, and a letter of credit. The petitioner sued the Bank for anticipated breach of letter of credit. Petitioner alleged jurisdiction under FSIA, 28 U. S. C. 1330 (a). The District Court while holding that FSIA permitted actions against states, dismissed the action on ground that none of exceptions existed.

The Second Circuit affrimed, but on ground that FSIA exceeded the scope of Act II of Constitution which provided, in part, that the judicial power of U. S. A. extend to all cases arising under the Constitution, the Laws of U. S. A., and the treaties made under their authority

and to "controversies between a state or a citizen thereof, and foreign states, citizens, or subjects." The Court held that neither the diversity clause nor "Arising Under" clause of Act III is broad enough to support jurisdiction over actions by foreign plaintiffs against foreign sovereigns.

The Supreme Court held that for the most part FSIA codifies as a matter of Federal Law, the restrictive theory of Foreign Sovereign Immunity under which immunity is confined to suits involving foreign sovereign's acts. If one of the specific exceptions to Sovereign Immunity applies, a Federal District Court may exercixe subject-matter jurisdiction under 1330 (a), but if the claim does not fall within one of the exceptions, the Court lacks this jurisdiction.

The remand was because the Court of Appeals in affirmation on other grounds did not find it necessary to address the satutory question of whether the action fell within any sepcified exception to Foreign Sovereign Immunity. Thus the U. S. Supreme Court was faced with a situation in which District Judge Weinfeld, 488 F. Supp. 1284 (S. D. N. Y., 1980) found that none of exceptions of FSIA applied and dismissed the action though he

found that FSIA permitted an action by a foreigner against a foreign state. Had the Court of Appeals affirmed on opnion of Weinfeld, there is no question that the case would not have gone to the Supreme Court. However, the Court of Appeals affirmed on other grounds. They need not reach this ground if they agreed that FSIA did not apply. That is the reason the case was remanded specifically to determine that issue.

The Supreme Court did not reverse the dismissal of action by Judge Weinfeld on non-existence of exception. Certainly, if the Court finds that FSIA does not apply, it will not reach the remainder of arguments raised.

The Supreme Court clearly stated at page 493:

> The Statute must be applied by the District Courts at every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to Foreign Sovereign Immunity 28 U. S. C. 1330 (a).

And on page 497:

> If a court determines that none of the exceptions to Sovereign Immunity applies, the plaintiff will be barred from raising his claim in any court in U. S. A.

And on page 498:

> In the present case, the District Court, after having satisfied istself to constitutionality of the act, held that the present action does not fall within any specified exception. The Court of Appeals, reaching a contrary conclusion as to jurisdiction.

We do not know the exact status of Petitioner, if he is stateless, as it is not stated in the Complaint of what country he is national or citizen, nor do we know of his immigration status. He cannot be a resident of U. S. A., and employed in foreign missions, enjoying privileges and immunity. Petitioner in Complaint is referring to jurisdictional statute 28 U. S. C. 1330, instead of FSIA 28 U. S. C. 1603-1611.

Checking the Record of U. S. Court of Appeals after remand by U. S. Supreme Court, Ver Linden V. Central Bank of Nigeria, 647 F. 2nd 320, (2nd Cir., 1981), was dismissed with prejudice on March 6, 1984 and mandate issued on March 26, 1984. Docket (80-7413).

Accordingly, the affirmance by U. S. Court of Appeals, the remand and dismissal by U. S. Court of Appeals affirms the order of District Judge who dismissed the action.

POINT V

THE DISTRICT COURT CANNOT ASSESS PUNITIVE DAMAGES AGAINST FOREIGN SOVEREIGN STATES AND THAT CAUSE OF ACTION CANNOT BE MAINTAINED

Petitioner is seeking punitive damages against United Arab Emirates and United Arab Emirates Mission.

It was held that the District Court cannot assess punitive damages against a foreign state.

Judge Pierce, sitting at U. S. District Court of S. D. N. Y. denied punitive damages against an instrumentality of a state. Decor by NIKKI Inter. V. Nigeria, 497 F. Supp. 893 (1980). It is stated in 28 U. S. C. S. # 1606 that a foreign state shall not be liable for punitive.

POINT VI

VENUE IS BASED ON ACTION AGAINST UAE MISSION IN NY

Petitioner is admitting that venue is established under 28 U. S. C. 1391. He brought the action in S. D. N. Y on premises that U. A. E. Mission to U. N. is the party, and an agent or instrumentality of U. A. E.

Had the action been brought against U. A. E., it was to be brought in Washington, D. C. [28 U. S. C. 1391 (d)].

Since Petitioner admits that juridiction is not based on diversity, he chose venue on basis of resident of all defendants, or where action arose, and they point to United Arab Emirates Mission to United Nations, and its Ambassador, who are indispensable parties, and since adding them as party defendants will destroy jurisdiction, the action should be dismissed on this ground. Shield V. Barro (1854) 11 How. 29, 15 L. Ed. 159, Minner V. South Pacific, (9th Cir., 1938). 98 F. 2d 913.

CONCLUSION

The Petition for Certriori should be denied.

Dated:
New York, New York
March 11, 1987

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